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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. [redacted] 60

TOWER HOSIERY MILLS, INC.,
PETITIONER,

VS.

NATIONAL LABOR RELATIONS BOARD
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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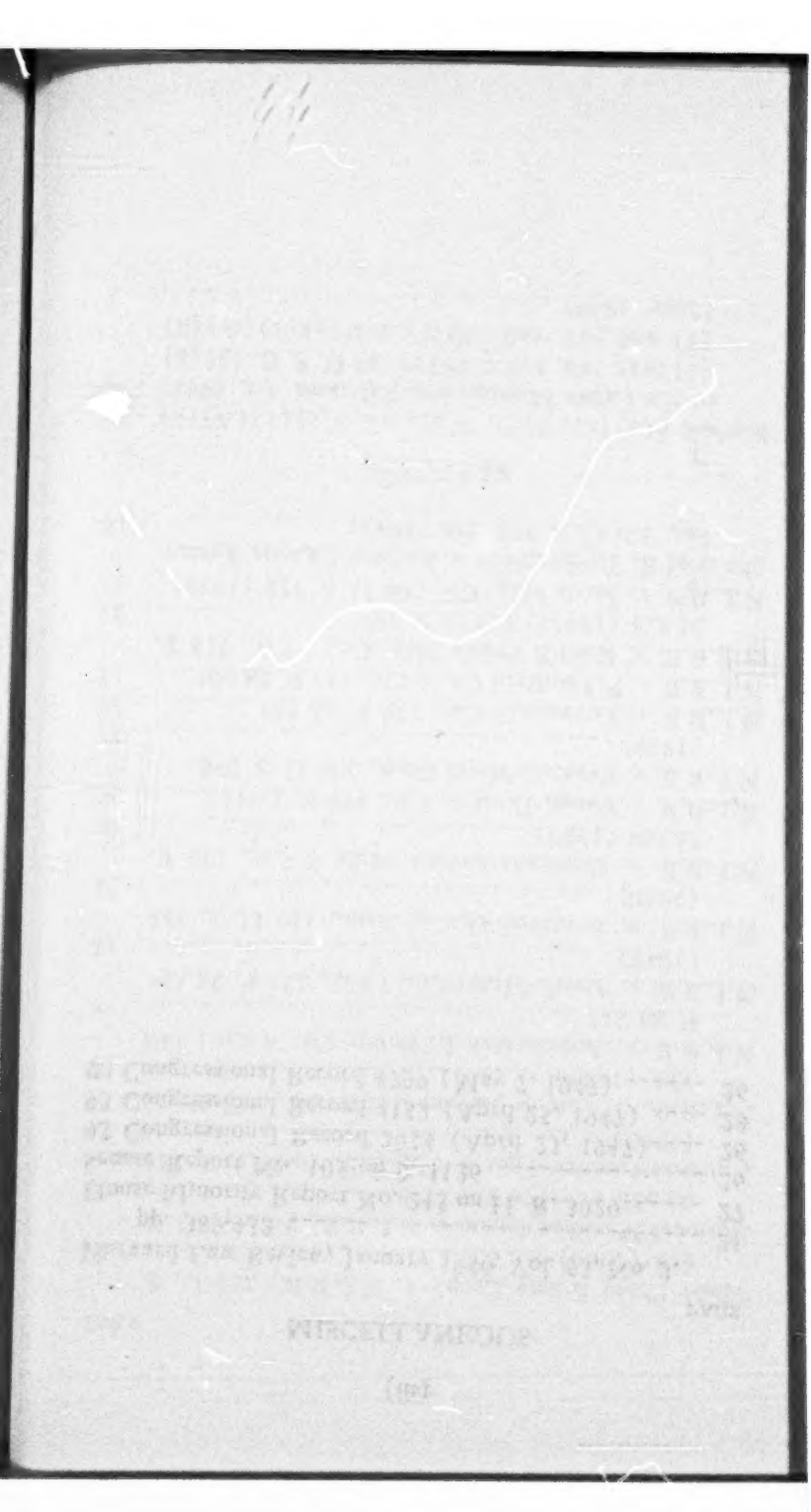

IN THE
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No.

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VS.
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RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Tower Hosiery Mills, Inc., prays for a writ of certiorari to the Court of Appeals for the Fourth Circuit to review the Decree of that court entered 6 March 1950 (R. 183), enforcing an order of the National Labor Relations Board entered 16 February 1949 (R. 1-7).

A certified transcript of the record in the cause, including the proceedings in the Circuit of Appeals, has heretofore been furnished in compliance with Rule 38 of this Court.

HISTORY OF THE CASE

This cause was instituted by the National Labor Relations Board (hereinafter referred to as the Respondent) issuing its complaint dated 21 March 1947 against Tower

Hosiery Mills, Inc., of Burlington, North Carolina (hereinafter referred to as the Petitioner), alleging that the Petitioner had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, 61 Stat. 136, 29 U. S. C. (1946 ed.), Supp. I, Secs. 151 et seq. An answer was duly filed by the Petitioner, admitting some of the allegations of fact contained in the complaint, but denying that it had engaged in any unfair labor practices.

A hearing of the charges was had on 2-11 June 1947 before a Trial Examiner of the Respondent. On 16 March 1948 the Trial Examiner entered an Intermediate Report in which he concluded that the Petitioner had engaged in certain of the unfair labor practices as alleged in the complaint but not in others (R. 62-63), and in which he recommended that it cease and desist therefrom and take certain affirmative action (R. 63-64).

The Petitioner in due course filed exceptions to the Intermediate Report and a supporting brief (R. 1). A three-man panel of the Respondent entered its Decision And Order on 16 February 1949 in which it adopted those parts of the Trial Examiner's findings, conclusions, and recommendations which were consistent with its own findings and conclusions as set forth in its written Decision and Order (R. 1-6), 81 N. L. R. B. 685.

Upon petition by Respondent to the United States Court of Appeals for the Fourth Circuit for enforcement of its Order, decree was filed and entered by a majority of the Court on 6 March 1950, enforcing the said Order of the Respondent and ordering the Petitioner to abide by and perform the directions of the Respondent in said Order contained (R. 183). The opinions of the majority of the Court of Appeals, and the dissenting opinion, were filed 6 March 1950 (R. 173-182) and are reported at 180 F. 2d 701.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code, as amended, Title 28 U. S. C., Section 1254(1), Act of June 25, 1948, C. 646, 62 Stat. 928.

STATUTES INVOLVED

The cause presents the proper construction of Sections 8(a)(5), 8(d), 9(a), and 9(c)(1)(A)(ii) of the Labor Management Relations Act, 1947 (61 Stat. 140, 143 (1947)), 29 U. S. C. 158(a)(5) and (d), and 159(a) and (c)(1)(A)(ii) (Supp. 1949).

SUMMARY STATEMENT OF MATTERS INVOLVED

The Petitioner is engaged in the manufacture of full fashioned hosiery at its plant in Burlington, North Carolina, and employs approximately 190 production and maintenance employees (R. 11).

On 15 October 1940 the Respondent conducted an election in the appropriate unit (production and maintenance employees), resulting in a vote favorable to the American Federation of Hosiery Workers, C. I. O. (hereinafter referred to as the Union). Collective bargaining negotiations ensued but were broken off by the Union with a threat of strike action (R. 11-12, 154). A second election was conducted by the Respondent on 9 November 1944, resulting in a vote of 68 for the Union and 82 against it (R. 12). A third election was conducted by the Respondent on 20 December 1945, resulting in a vote of 98 for the Union and 70 against it, and a certification on 4 January 1946 by the Respondent of the Union as the bargaining agent (R. 12-13).

On 31 December 1945, and at the beginning of a new year, the Petitioner posted four work rules which had been

in existence at the plant and always understood but which had not been enforced during the war period when labor was scarce. The Trial Examiner found that the posting of these plant rules, without prior consultation with the Union, did not constitute a violation of the Act (R. 33). The Respondent disagreed and held that a violation of the Act took place in this respect (R. 3).

"During a period of more than nine months, beginning on January 24 and ending November 4, 1946, nineteen conferences were held between representatives of the Petitioner and the Union. Correspondence was also exchanged from time to time (R. 34)." During this period numerous proposals and counter-proposals, oral and written, were made by the parties. "There was full discussion of the proposals and viewpoints advanced" (Int. Rep., R. 34). "For the most part, both the Union and the Petitioner, during the earlier conferences, held to their positions, although the Union gradually receded on most of its demands" (Ibid. R. 34).

At the conclusion of the last conference on 4 November 1946 there remained "in issue only the underlined provisions of Article IX"—a clause placing duties and responsibilities upon the Union for strikes in breach of the contract (Int. Rep., R. 54). All other terms of a mutually satisfactory agreement were arrived upon. The Respondent found that "from the outset of the negotiations in January 1946, the Petitioner insisted upon, and the Union objected to, a contract clause" such as ultimately was to cause the impasse in negotiations (R. 4).

On 29 July 1946 the Petitioner put into effect a general wage increase in the same amount as granted by all other mills in the area. Notice of the increase was given by letter to the Union and it was over a week later before it raised objections to the increase. The trial Examiner found that the putting into effect of this general increase did not con-

stitute a violation of the Act (R. 47), but the Respondent disagreed (R. 5).

When the Petitioner granted the area wage increase in July 1946 it simultaneously restored the rates and practices for one group of its workers, the seamers, as it had previously promised to do. The Trial Examiner was of the opinion that this action by the Petitioner did not violate the Act (R. 37) but the Respondent again disagreed (R. 4).

The Decision and Order of the Respondent in this cause was entered on 16 February 1949 directing the Petitioner to bargain collectively with the Union. On 23 March 1949 a petition was filed with the Respondent by a group of 125 employees of the Petitioner (or more than 80% of its employees) asserting that the Union was no longer a representative as defined in Section 9(a) of the Act (R. 70-71). This decertification petition was prepared for the group of employees by their counsel in accordance with the requirements of Section 9(c)(1)(A)(ii) of the Act and the applicable regulations as prescribed by the Respondent. The Petitioner was notified of the filing of the decertification petition and was requested to suspend negotiations with the Union pending a determination of the representation question raised by the Petitioner (R. 70-71). The Petitioner thereupon moved the Respondent to reopen the record in this cause and receive evidence on the matters asserted in the decertification petition, and to thereafter modify its Decision and Order in such manner as might be required by the circumstances and conditions occasioned by the decertification petition (R. 67-69). On 11 April 1949 the Respondent enterd an order denying the motion (R. 72), and refusing to investigate the petition or to provide for a hearing to determine the question of representation thereby raised on the stated ground that its outstanding order requiring the Petitioner to bargain collectively with the Union had not been complied with.

Holding By National Labor Relations Board

The Respondent, after considering the Intermediate Report of the Trial Examiner and the Petitioner's exceptions thereto, and the record in the case (other than the employees' decertification petition which was filed later) concluded that the Petitioner had "refused to bargain with the Union in violation of Section 8(1) and (5) of the Act" (R. 1). The Respondent specifically found that the Petitioner's "insistence upon the inclusion in the contract of an unreasonably drastic union liability clause constituted a refusal to bargain in good faith with the Union" (R. 3). The Respondent relied upon the following alleged evidences of a refusal to bargain within the meaning of the Act: the posting of working rules without consulting the Union (R. 3); the granting of an area wage increase in July 1946 upon short notice to the Union (R. 3, 5); and the restoration of the previous rates and practices for the seamers in July 1946 without consulting the Union (R. 4).

Majority Opinion of the Court of Appeals

The majority of the Court concluded that the Respondent's findings of a violation of the Act were supported by substantial evidence, that its Order, based on such findings, was valid, and accordingly should be enforced (R. 181-2).

(1) Refusal to bargain: While the majority opinion relies upon the same alleged evidences of refusal to bargain as set out in the Respondent's decision (R. 180), yet the keystone of its conclusion is founded in the Petitioner's proposal for an union-responsibility clause. The opinion sets out this clause in its entirety (R. 176-8) and describes its effect in the following language (R. 178):

> "The stringent provisions of Article IX penalize the Union quite severely. The provision penalizing the Union for the conduct of employees who engage in Un-

ion activities on Company time, was apparently previously unheard of in this area. This provision would impose a tremendous burden on the Union, which would be hard put to control all of its members all of the time. The other provisions seem to have resulted from an attempt by respondent to cull the most drastic provisions it could discover embodied in other contracts. Article IX was made the *sine qua non* of agreement on the part of respondent. Yet respondent must have been well aware that the Union would never agree to any contract containing Article IX *in toto*."

(2) De-certification petition: Without discussing or giving effect to the provisions of Section 9(c)(1)(A)(ii) of the Act, the majority disposed of this aspect of the case by a holding that "the loss of Union majority subsequent to the issuance of the Board's Order, under the factual situation here involved, did not affect the validity of the Order" (R. 181).

Dissenting Opinion of the Court of Appeals

Circuit Judge Soper filed a dissenting opinion in which he sets forth his conclusion that the order of the Respondent is not supported by substantial evidence (R. 182).

(1) Refusal to bargain: "It seems equally clear that the employer had the right to insist upon penalties which would be imposed upon the union only if it would violate its contract. The parties met nineteen times for negotiations in an attempt to adjust their differences. They split in the end largely on the question of union liability for breach of contract, and it cannot justly be said that the employer refused to bargain because it would not recede from its position on this crucial point. To make such a holding does not promote collective bargaining. On the contrary, it interferes with

the freedom of the parties because it enables the Board, with the approval of the court, to put pressure on one of the negotiators to accept an agreement to which it objects. In the end the Board will be the arbiter as to what terms the employer may reasonably insist upon and an approach to compulsory arbitration will have been made which the statute does not contemplate" (R. 182).

(2) De-certification petition: Because he did not consider that the Respondent's order should be enforced, Judge Soper apparently did not feel that it was necessary to discuss this aspect of the case. However, his views on the subject, as expressed in dissenting opinions in *Great Southern Trucking Co.* v. *N. L. R. B.*, 4 Cir., 139 F. 2d 984 and *N. L. R. B.* v. *Appalachian E. Power Co.*, 4 Cir., 140 F. 2d 217, clearly demonstrate that he would consider the Respondent obligated to investigate the question of representation affecting interstate commerce raised by the decertification petition.

QUESTIONS PRESENTED

1. Is the proper function of the National Labor Relations Board, and the reviewing courts, under Section 8(a)(5) and 8(d) of the Labor Management Relations Act, 1947, limited to organization for collective bargaining, or may they also regulate the collective bargaining process by interjecting themselves into the conference room and there considering whether a specific contractual proposal upon which one of the parties insists as a condition to making a contract is unreasonable and hence a test of bad faith bargaining, or reasonable and hence a test of good faith bargaining? Specifically, was the Board and the majority of the Court of Appeals permitted by the Act to examine the character of the Petitioner's demand for a union-responsibility clause and, as a result of such examination, being of the opinion that some of the provisions of the demand were "stringent", were "apparently previously unheard of in this

area", and would "impose a tremendous burden on the Union", then order the Petitioner to make concessions in the provisions thereof to the point where the government would find same to be reasonable and hence a part of good faith bargaining?

2. Where a group of more than 80% of the employees in the appropriate unit file a petition with the National Labor Relations Board pursuant to the provisions of Section 9 (c) (1) (A) (ii) of the Labor Management Relations Act, 1947, asserting that the labor organization which had been certified more than 3-1/4 years previously, and which had terminated the bargaining relationship more than 2-1/3 years previously, was no longer a representative, may the Board refuse to investigate such petition and determine by an election the employees' wishes as to the bargaining representative, thereby fixing a permanent bargaining relationship without regard to the new situations that have developed since the last election in December 1945?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

IMPORTANCE OF THE QUESTIONS PRESENTED WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. Refusal to bargain: Section 8(a)(5) of the Labor Management Relations Act, 1947, provides:

> "It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

Section 8(d) of the Act provides:

> "For the purposes of this section, *to bargain collectively is* the performance of the mutual obligation of the employer and the representative of the employees *to*

> ***meet at reasonable times and confer in good faith*** with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, ***but such obligation does not*** compel either party to agree to a proposal or ***require the making of a concession.***" (Italics supplied.)

Section 9(a) of the Act provides:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

In the instant case the National Labor Relations Board and the majority of the Court of Appeals have, by their holding that the Petitioner evidenced a lack of good faith in bringing to the bargaining table a demand for a union responsibility clause in the event of a strike in breach of the contract which it considered unreasonable and harsh, taken a step beyond the stage of recognition required by the Act and have assumed an unwarranted role in regulating both the processes of collective bargaining and the terms of collective agreements. By its opinion the Board and the majority of the Court of Appeals in this case have effectively regulated the substantive scope of collective bargaining during the negotiation of an agreement between an employer and a union.

The determination of whether the proper function of the Board under Sections 8(a)(5) and 8(d) of the Act is limited to organization for collective bargaining or

whether it may also interject itself into the conference room and there regulate the collective bargaining process has been noted by only a few courts and has never been decided by this Court.

There is an increasing tendency towards government regulation of both the process of collective bargaining and the terms of collective agreements, and this tendency has been heightened by the ambiguity of the quoted sections of the Act which invite a union lacking the economic power to secure their objectives through collective bargaining to carry the issue to the National Labor Relations Board and the courts. There are disturbing indications that the Board has assumed that it is a refusal to bargain collectively if one of the parties insist upon including in any contract negotiated by the parties a clause which the Board considers an inappropriate demand. Following its decision in the instant case comes *In re Dalton Tel. Co.*, 82 N. L. R. B. No. 131 (April 12, 1949), where the Board held that there was a violation of Section 8(a)(5) if the employer insisted on a provision that the union subject itself to suits as an entity by registering in a manner provided by the Georgia Code, even though the parties had bargained out all of the other substantive issues in dispute. *In re American National Insurance Co.*, 89 N. L. R. B. No. 19 (April 1950) presents an instance where the Board found a refusal to bargain when the employer insisted on a "management rights" clause in the agreement.

A resolution by this Court of the question will have immediate purpose far beyond the particular facts and parties here involved. Every employer and labor organization in our economic system is vitally concerned with a determination of this important issue by this Court following adequate consideration of all the implications involved. The Petition should be granted so that the determination of this and allied questions in haphazard litigation may cease and a

correct and authoritative interpretation of Section 8(a)(5) and 8(d) be given.

The question as to whether the Board and the courts may regulate the processes of collective bargaining and the terms of collective agreements through an examination of the character of the demand and a consideration of specific contractual proposals, is squarely presented for determination by this Court. The dissenting opinion of Judge Soper clearly states the effect of the majority ruling: "In the end the Board will be the arbiter as to what terms the employer may reasonably insist upon and an approach to compulsory arbitration will have been made which the statute does not contemplate" (R. 182).

The question presented has not been determined by any decision of this Court. The case of *National Licorice Co., v. N. L. R. B.*, 309 U. S. 350 (1940) holds only that it is within the power of the Board under Section 10(c) to order an employer to cease giving effect to individual contracts of employment, procured by unfair labor practices, in which the employees promised not to demand a closed shop on the execution of a signed collective agreement, although it is true that the opinion describes such matters as "frequent subjects of negotiation between employers and employees."

B. Decertification petition: Section 9(c)(1)(A)(2) provides that:

> "Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees . . . (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining

> representative, is no longer a representative as defined in Section 9(a); . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists, shall provide for an appropriate hearing upon due notice."

Such a petition was filed with the Board in this case by more than 80% of Petitioner's employees at a time more than 3-1/2 years after the employees had last had an opportunity to express their preferences for a bargaining representative. A showing was made that at the time the decertification petition was filed 38% of the employees in the unit had been employed subsequent to the last election in December 1945 (R. 68) and therefore had never had an opportunity to express their preference for a bargaining agent but who, on the contrary, assert by their petition that they do not desire to be represented by the Union. Further, a showing was made that of the 50 employees of Petitioner who had entered into the armed services during World War II only 20 had been released from service and returned to work by the time of the election in December 1945 (R. 68) and therefore 30 employees have never had an opportunity to express their preference for a bargaining agent. Finally, a showing was made that 50 new employees were expected to be added to the working force of the Petitioner in order to man 10 new knitting machines which were on order, and therefore this large group of employees are denied the opportunity to express their preference for a bargaining agent (R. 68).

The Board has refused to investigate the petition and provide for the hearing contemplated by the Act. The Court of Appeals totally ignores the impact of Section 9(c)(1)(A)(ii) of the Act and decides the case on administrative principles formulated prior to the specified amendment of the Act. Thus, the question of whether a

group of employees is entitled to an investigation of, and hearing on, its decertification petition filed under Section 9(c)(1)(A)(ii) of the Act more than 3-1/4 years after the last election and more than 2-1/3 years after the last bargaining conference between the employer and the Union, irrespective of a finding of a violation of the Act against the employer, is squarely presented for determination by this Court. The question has never been decided by this Court.

It is important to all employees in our economic society who are now represented by a collective bargaining agent, or who might be so represented in the future, together with their employers, that the Court hear this petition and determine whether the Board has given a correct interpretation to Section 9(c)(1)(A)(ii) of the Act.

II.

The Opinion of the Majority Decides Federal Questions in a Way Probably in Conflict With Applicable Decisions of This Court.

A. Refusal to Bargain: The decision of the majority of the Court of Appeals that the Board may make the reasonableness or unreasonableness of one of the demands of a party to collective bargaining a test of good faith bargaining is probably in conflict with the following applicable decisions of this Court: *Order of R. Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 346 (1943): "Collective bargaining was not defined by the statute which provided for it, but it generally has been considered to absorb and give statutory approval to the philosophy of collective bargaining as worked out in the labor movement in the United States." Cf. *H. J. Heinz Co.* v. *NLRB*, 311 U. S. 514, (1941); *J. I. Case Co.* v. *NLRB*, 321 U. S. 332 (1944); *Colgate-Palmolive-Peet Co.* v. *NLRB*, 338 U. S. 355 (1949).

B. Decertification Petition: The decision of the majority of the Court of Appeals that the validity of the Board's Order was not affected by the changed situations resulting from the decertification petition directly conflicts with the applicable decision of this Court in *Franks Bros. Co.* v. *N. L. R. B.*, 321 U. S. 702 (1944):

> "Contrary to petitioner's suggestion, this remedy, as embodied in a Board order, does not involve any injustice to employees who may wish to substitute for the particular union some other bargaining agent or arrangement. For a Board order which requires an employer to bargain with a designated union is not intended to fix a permanent bargaining relationship without regard to new situations that may develop . . . After such a reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships."

The *Franks Bros.* case was decided prior to the amendment of the Act in 1947 which added Section 9(c)(1)(A)(ii). This section unequivocally sets up necessary and proper procedure to be followed by employees who desire to express their preference for a bargaining representative. In the instant case the procedure of the Act and the directions of this Court were explicitly followed by the employees. For the Board to refuse to investigate the petition and order an election constitutes a clear "administrative amendment of the statute" which has been proscribed by this Court in the recent case of *Colgate-Palmolive-Peet Co.* v. *N. L. R. B.*, 338 U. S. 355, decided Dec. 1949. This refusal of the Board to carry out the mandate of the Act can be corrected only through judicial review of proceedings brought against an employer; nonetheless, it is self-evident that the question is of greater importance to the employees, for whose bene-

fit Section 9(c)(1)(A)(ii) was enacted, than to employers who will recognize such majority representative as the employees may choose.

The majority of the Court (R. 180) apparently based its decision on the ruling of this Court in *Medo Corp.* v. *N. L. R. B.*, 321 U. S. 678 (1944). But in the *Medo* case the employer was the party who sought to "dis-establish the union as the bargaining representative of the employees," while in the instant case it is the employees themselves who seek to "dis-establish the union." In the *Medo* case this Court expressly reserved its decision on the subject matter here involved:

> "There is no necessity for us to determine the extent to which or the periods for which the employees, having designated a bargaining representative, may be foreclosed from revoking their designation, if at all, or the formalities, if any, necessary for such a revocation."

Finally, it must be remembered that at the time of both the *Medo* and the *Franks Bros.* decision there was no provision in the Act such as presently embodied in Section 9(c)(1)(A)(ii).

III.

The Opinion Is In Direct Conflict With Decisions of Other Courts of Appeals on The Same Matters

A. Refusal to Bargain: The decision of the majority of the Court of Appeals that the Board may make the reasonableness or unreasonableness of one of the demands of a party to collective bargaining a test of good faith bargaining is probably in conflict with the decisions of the Courts of Appeals for the Fifth and Sixth Circuits. In *N. L. R. B.* v. *Corsicana Cotton Mills*, 5 Cir., 179 F. 2d 234 (Jan.

1950) the employer and the union had engaged in collective bargaining but had failed to reach agreement over the terms of an arbitration clause. The court noted that "The real reason such an agreement was not reached sooner was because the union would not agree to certain things that the respondent in good faith deemed necessary to the agreement, and the respondent would not agree to certain other things that the union in good faith likewise deemed necessary thereto. There is no showing that the respondent ever refused to negotiate when called upon to do so by the union." The court then concluded that the employer had not contumaciously refused to bargain pursuant to its order and stated:

> "The National Labor Relations Act, 29 U. S. C. A. Sec. 151 et seq., requires good-faith bargaining, with the purpose of reaching an agreement, but it does not require that any particular form of agreement be reached. The law does not authorize the National Labor Relations Board or the courts to make collective bargaining contracts or to prescribe what shall be written into them. Neither the courts nor the Board may interfere in negotiations as long as they are being carried on in good faith. National Labor Relations Board v. Whittier Mills Company, 5 Cir., 123 F. 2d 725."

In *N. L. R. B.* v. *P. Lorillard Co.*, 6 Cir., 117 F. 2d 921, the court ruled as follows:

> "The Board is not authorized, by statute or court decision, to shape or control the course of the negotiations between employer and employee, so long as the employer bargains collectively, in accordance with the statute . . . The Act nowhere attempts to define what agreement shall be offered by the employer or by the union in the bargaining . . . Collective bargaining requires negotiations by the employer with representa-

> tives of the employees, chosen by themselves, freely and without coercion, and has no reference to the terms of the agreement offered so long as the parties negotiate in good faith with the view of reaching an agreement . . . The sincerity of the employer's effort in negotiating with a labor organization, under the statute is to be tested by the length of time involved in the negotiations and the persistence with which the employer offers opportunity for agreement."

The dissenting opinion (R. 182) points out quite clearly that the result of the holding of the majority of the court conflicts with the purposes of the Act. If the opinion of the majority is approved it will introduce uncertainty in the administration of the Act and will represent a confusion as to the powers of the Board and the courts to regulate the processes of collective bargaining and the terms of collective agreements.

B. Decertification Petition: The decision of the majority of the Court of Appeals that the validity of the Board's order was not affected by the changed situation and the filing of the decertification petition by more than 80% of the employees probably conflicts with the statements in the decisions of the Seventh and Ninth Circuits in *N. L. R. B.* v. *Arnolt Motor Co.*, 7 Cir., 173 F. 2d 597 (1949), and *N. L. R. B.* v. *Andrew Jergens Co.*, 9 Cir., 175 F. 2d 130 (1949).

WHEREFORE, your Petitioners respectfully pray that a Writ of Certiorari be issued under the seal of this Court, directed to the United States Court of Appeals for the Fourth Circuit, commanding the said Court to certify and send to this Court on a day to be designated a full and complete transcript of the record and all proceedings of the Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court, as

provided in the statutes of the United States, that the decree of the Court of Appeals be reversed and that Petitioners be granted such other and further relief as may seem proper.

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SUPPORTING BRIEF

A. Refusal to Bargain

Neither the National Labor Relations Act nor the Labor Management Relations Act, 1947, were concerned, except incidentally, with what took place after the proper union had been recognized by the employer and negotiations were under way. The purpose of the Act was thus stated by Senator Walsh as follows:

> "The bill indicates the method and manner in which employees may organize, the method and manner of selecting their representatives or spokesmen, and leads them to the office door of their employer with the legal authority to negotiate for their fellow employees. The bill does not go beyond the office door. It leaves the discussion between the employer and the employee, and the agreements which they may or may not make, voluntary."—79 Cong. Rec. 7659-60 (1935). See also Sen. Rep. No. 573, 74th Cong., 1st Sess. 595 (1935).

The language of Section 8(a)(5) of the Act accords with its history and purpose. This section merely provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." If these words are given their normal meaning and if the legislative history is given consideration, the only duty placed upon the employer is to accord recognition to the representative designated by the employees and to accept in good faith the practices and procedures of collective bargaining. The addition of Section 8(d) to the Act in 1947 fully confirms this view. That section expressly provides that an employer or a union has fulfilled its duty to bargain collectively where it performs the obligation of meeting at reasonable times and conferring in good faith with

respect to specified matters, and executing a written contract incorporating any agreement reached if requested by either party, "but such obligation does not compel either party to agree to a proposal or require the making of a concession." The statutory scheme seems quite clear.

Previously cited in the Petition are the decisions of this Court that touch on the subject and the decisions of the Courts of Appeals for the Fifth and Sixth Circuits in *N. L. R. B.* v. *Corsicana Cotton Mills* and *N. L. R. B.* v. *P. Lorillard Co.*, supra. For a complete and informative discussion of the subject, see leading article in *Harvard Law Review*, January 1950 issue, Vol. 63, No. 3, pp. 389-432. In this article, entitled "Regulation of Collective Bargaining By The National Labor Relations Board," its writers, Professors Cox and Dunlop, state their views as follows:

> "The interpret section 8(a)(5) as substituting government decree for the process of 'defining the scope of collective bargaining by collective bargaining' would, by substituting government regulation for private agreement, carry the administration of the Act into a field which its sponsors believed the government should not enter (418) . . . All that good faith requires is that the employer treat the issue as one to be resolved by bargaining and be willing with an open mind to consider the opposing arguments and explore the possible solutions (422) . . . As a practical matter an employer cannot bargain effectively if section 8(a)(5) compels him to yield before an impasse is reached (423)."

We are not concerned in the instant case with a situation where an employer has precluded agreement by insisting on contractual terms which would deprive employees of rights guaranteed under the Act. Thus, concededly an insistence on a promise not to demand a union security clause in the future is a mark of bad faith and a refusal to bargain because

it forestalls future collective bargaining upon a matter which is the frequent subject of negotiations between employers and employees (*N. L. R. B.* v. *Reed & Prince Mfg. Co.*, 1 Cir., 118 F. 2d 874 (1941); Cert. den. 313 U. S. 595). Similarly, it is a refusal to bargain where employer insists on Union accepting a members-only clause. (*McQuay-Norris Mfg. Co.* v. *N.L.R.B.*, 7 Cir., 116 F. 2d 748, Cert. den. 313 U. S. 565) or insists on reserving the right to grant merit increases unilaterally (*N. L. R. B.* v. *J. H. Allison & Co.*, 6 Cir., 165 F. 2d 766, Cert. den. 335 U. S. 814). Nor are we concerned in this case with a situation where one of the parties has insisted on agreement by the other to do that which the Act positively forbids. Thus, concededly, the insistence by a union on the inclusion of a closed shop or hiring hall provision in a contract when same is expressly prohibited by the Act, costitutes evidence of bad faith and warrants a finding of refusal to bargain (*National Maritime Union* v. *N. L. R. B.*, 2 Cir., 175 F. 2d 686 (1949); Cert. den. 338 U. S.——). Rather, in the instant case, the employer has merely asserted its right to negotiate over a union-responsibility clause and has approached the bargaining table with an open mind and not with a fixed determination to avoid agreement unless the Union would relinquish a significant portion of its bargaining rights or take some action forbidden by the Act.

B. Decertification Proceeding

The National Labor Relations Act from its enactment in 1935 until its amendments in 1947, provided in simple language that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining" (Section 9(a)). The original law was just that simple. Literally

applied, it would have precluded any reasonable degree of stability in collective bargaining relations by requiring a shift in employees' exclusive representation with every shift of majority sentiment. It would have set no limits on the number of shifts within a year nor would it have recognized a contract or even a Board certification as protecting the status quo against such shifts. As a matter of necessity, therefore, and in the interest of attaining stability for bargaining relationships, the Board evolved, and the courts approved, a limit upon unqualified majority rule. This limit set the period of a year as the time within which a certified union could enjoy, undisturbed by a new determination of representatives, the exclusive right to represent all the employees in the unit. Another limit soon followed, namely, the evolvement of a "contract bar" doctrine which recognized an employer-union contract as barring a new determination of representatives during its term.

Even so, this Court has consistently pointed out that the Act was designed for the benefit of employees—not for the employer and not for the union—and that they had the right to change their bargaining representatives at reasonable intervals. The first decision of this Court on the matter was *N. L. R. B.* v. *Fansteel Metal Corp.*, 306 U. S. 240 (1939) where the Court agreed with the employer's contention that because of "altered circumstances" since the last election the case should be remanded to the Board with direction to ascertain whether the employees continued to desire representation by the previously designated union. The "altered circumstances" theory was reaffirmed in the case of *N. L. R. B.* v. *Sands Mfg. Co.*, 306 U. S. 332 (1939). Next, in *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350 (1940), this Court, in affirming the ruling of the Court of Appeals for the Second Circuit, said:

> "Such injury, if any, as the petitioner might have suffered from the Board's order requiring it to recognize

> and bargain with the Union, is avoided by the direction of the Court of Appeals that this part of the order be conditioned upon a determination by an election that the Union is still the choice of a majority of the employees. The Board has not petitioned for certiorari and does not complain of this direction."

In *N. L. R. B. v. Bradford Dyeing Asso.*, 310 U. S. 318 (1940), this Court pointed out that in that case the Board had found as a fact and concluded after investigation that the union at all times was the exclusive representative of the employees and that therefore there was no occasion for another election; the opinion clearly indicates, however, that an investigation would have been necessary had not the Board already made its findings and conclusions on the subject. In *International Asso. etc.* v. *N. L. R. B.*, 311 U. S. 72 (1940), the Court denied the petition of an intervening union which sought to be recognized as bargaining representative on the ground that the employees had changed their sentiment from the certified union to the intervenor. The petition was denied because "petitioner made no showing at the hearing that a majority of the employees had shifted to it after the employer refused to bargain with U. A. W. Nor did it seek leave from the court below to adduce such additional evidence pursuant to Section 10(e), 29 U. S. C. A. Section 160(e)." In the instant case both a showing has been made and leave was sought from the court below to adduce such additional evidence. In *N. L. R. B.* v. *P. Lorillard Co.*, 314 U. S. 512 (1942), the Court refused to order a new election but only because it affirmatively appeared that "the Board had considered the effect of a possible shift in membership, alleged to have occurred subsequent to Lorillard's unfair labor practice" and had determined as a fact after investigation that the shift took place because of the employer's unfair labor practice. The ruling of this Court in *Medo*

Photo Supply Corp., v. *N. L. R. B.*, 321 U. S. 678 and *Franks Bros. Co.* v. *N. L. R. B.*, 321 U. S. 702 have been discussed in the Petition and reference is made thereto. It is re-emphasized that the showing in the instant case requires the Board to determine whether there should be changed bargained relationships as directed by the Court in the *Franks Bros.* case.

Additional and decisive cases from the Court of Appeals on this aspect of the case are to be found in *Hamilton-Brown Shoe Co.*, v. *N. L. R. B.*, 8 Cir., 104 F. 2d 49; *N. L. R. B.* v. *Lovvorn*, 5 Cir., 172 F. 2d 293; and *N. L. R. B.* v. *Eanet*, D. of C. Cir., 179 F. 2d 15.

Thus, under the applicable provisions of the Act prior to its amendment in 1947 and the decisions of this Court and other courts of appeals cited above, it is submitted that the Board should have investigated and determined the claim of more than 80% of the employees that there had been a change in circumstances and a shift in their affiliation. Even if this position were debatable under the Wagner Act, it is free from doubt under the amendments to the Act in 1947. Section 9(c)(1)(A)(ii) of the Act is clear and specific in its demand that the Board investigate the decertification petition of these employees and determine the matter of representation thereby raised. That this section of the statute was added for the very purpose covered by this case is made abundantly clear by reference to the legislative history of the Act. The advocates of the amendment pointedly stated its purpose:

> "Despite the absence of discriminatory language in the act, the Board refuses to entertain petitions filed by employees who wish to demonstrate that the current or asserted bargaining representative is not the choice of the majority. The only relief for employees suffering from representation by a radical or racketeering union is to file a petition designating another

> union as their repesentative. This, of course, puts a premium upon raiding and jurisdictional rivalries. The committee bill woud make it necessary for the Board to entertain petitions from employees irrespective of the kind of relief sought. It does not change the Board's rules of decision with respect to requirements of substantiality in order to obtain a hearing or the rules which militate against a change in bargaining representatives while a lawful collective agreement is in effect."—Senate Report No. 105 on S. 1126 submitted by Senator Taft for the Committee on Labor and Public Welfare.

Senator Taft stated from the Senate floor, in discussing the terms of the bill:

> "We provide, further, that there may be an election asked by the men to decertify a particular union. Today if a union is once certified, it is certified forever; there is no machinery by which there can be any decertification of that particular union. An election under this bill may be sought to decertify a union and go back to a nonunion status, if the men so desire." —93 Cong. Rec. 3954 (April 23, 1947).

Senator Morse, speaking from the floor of the Senate said with reference to this section:

> "Under section 9(c) of the bill employees are free, if they do not like the representation the international is giving them, to file a petition with the Board asserting that the international is no longer their representative. If such petition is filed, the Board is required to investigate, and if it believes a question of representation has arisen, it must provide for a hearing and an election."—93 Cong. Rec. 4799 (May 7, 1947).

The opponents of the amendment, on the other hand, clearly stated that they were opposed to the proposed section because they considered that it would result in frequent elections and the possibility of dissident employees frequently seeking to change their bargaining representative. Thus, in the House Minority Report No. 245 on H. R. 3020 it is stated:

> "Under section 9(c)(2) employees may at any time (as is confirmed by the language of sec. 9(c)(7)), present a petition claiming that the certified bargaining representative no longer represents a majority of employees. This provision is a deliberate effort to undermine the status of a collective-bargaining representative at any time after a certification has been issued, contrary to the rule adopted by the Board and enforced by the courts that certifications are normally effective for a period of 1 year. Even during the life of a valid contract employees may thus undertake to repudiate their representative. No provision could more clearly serve to point up the dominant purpose of this legislation; to break up trade-unions as rapidly and with as few impediments as possible."

Representative Powell, speaking from the House floor on the amendment said:

> "If a union loses an election, no further election can be held for a year; but if the union wins, then a group of discontented employees can come to the Board at any time to get an election to 'decertify' the union."—93 Cong. Rec. 3586 (April 16, 1947).

Senator Murray made a similar point in the debate on this section of the Act:

> "A year could very easily elapse, therefore, between the election and the consummation of the bargaining

negotiations by a contract. At this point, a group of dissident employees, with or without the encouragement of the employer, might demand a new election under this provision, thereby delaying or defeating collective bargaining.

"We have not yet reached the point in labor-management relations where employers generally have fully accepted the principles of collective bargaining. Until we reach that point we must not, in the interests of the American people, furnish antiunion employers with statutory techniques by the use of which they can avoid or defeat the collective-bargaining process." — 93 Cong. Rec. 4153 (April 25, 1947).

The mandate of the Act with regard to decertification petitions is clear. The Board should not be permitted "by administrative amendment of" Section 9(c)(1)(A)(ii) to deprive any group of employees of their right to express their wishes with regard to a bargaining representative simply because it considers as an administrative policy that the effects of an employer's unfair labor practice always causes a change in sentiment or a defection in membership. *Colgate-Palmolive-Peet Co.* v. *N. L. R. B.*, 338 U. S. 355.

Respectfully submitted,
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QUESTIONS PRESENTED

1. Whether proposals advanced and positions taken by the employer during the course of negotiations may properly be considered by the Board in determining whether the employer has engaged in collective bargaining in good faith.

2. Whether the validity of the Board's bargaining order is affected by an allegation that, subsequent to the entry of the order and while the employer's unlawful refusal to bargain remains unremedied, the Union lost its majority status.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., 151, *et seq.*), and of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*) are set forth in the Appendix, *infra*, pp. 22–26.

STATEMENT

Upon the usual proceedings under Section 10 of the National Labor Relations Act, as amended, the Board, on February 16, 1949, issued its findings of fact, conclusions of law, and order (R. 1–65).[1] The pertinent facts, as found by the Board

[1] In its decision (R. 1–5), the Board adopted, with substantial modifications and additions, the findings, conclusions and recommendations contained in the trial examiner's intermediate report (R. 8–65).

and shown by the evidence, may be summarized as follows:[2]

The Company, a North Carolina corporation, is engaged in the manufacture and sale of full-fashioned hosiery at its plant in Burlington, North Carolina (R. 76). On January 4, 1946, pursuant to the results of an election conducted by the Board on December 20, 1945, the Board certified American Federation of Hosiery Workers (herein called the Union) as exclusive bargaining representative of the Company's production and maintenance employees (R. 12–13; 75–76).

On December 31, 1945, ten days after the Union won the election and only four days before the Union was certified by the Board, the Company, without notifying or consulting the Union, promulgated and posted certain rules regulating smoking by employees, leaving of machines during working hours, and maintenance of needles for inspection (R. 31–32; 79, 80, 111, 118). The Company admitted that none of these rules had been enforced or even reduced to writing for at least five years (R. 3; 79, 111, Tr. 817), and that some of the rules introduced new restrictions or prescribed new penalties (R. 32; 79, Tr. 297).

The Union initiated negotiations with the Company on January 10, 1946 (R. 34; 122). At the

[2] In the following statement, the references preceding the semi-colon are to the Board's findings; succeeding references are to the supporting evidence.

first two meetings the parties discussed the Union's proposed contract (R. 35; 82–83). The Company took the position that it would not agree to the principle of binding arbitration, the closed shop, bonus payments, the Union's customary clause banning strikes and lockouts except upon the refusal of either party to carry out an arbitrator's decision, and certain provisions such as those pertaining to overtime and paid holidays, which were allegedly not in line with area practice (R. 35–37; 82–83, 85, 110–111). The Company reiterated its position at the next two conferences held on February 6 and 7 (R. 37–38, 39; 84, 85, 94, 95). Although the Union withdrew its original closed shop proposal and substituted therefor a proposal for a union shop with preferential hiring through the Union, the Company insisted upon a provision that "The Company will operate an open shop," a position from which it thereafter refused to recede (R. 38; 84, 92, 95). The Company also rejected two additional Union proposals discussed at these meetings, concerning seniority and wages, the former because it regulated layoff and promotion procedure, a matter which, the Company contended, was purely a management prerogative (R. 38–39; 84, 95); and the latter on the ground that it would not grant any wage increase beyond that put into effect by other employers in the area (R. 39; 85, 106, 109, 110).

At the February 6 and 7 conferences, the parties agreed to apply to the Company's plant a general wage increase theretofore announced by other employers in the area (R. 37; 94, 109, 111). When putting the area increase into effect, however, the Company, without consulting the Union, made certain changes in piece rates and practices pertaining to the seaming of heels (R. 4; 100, 115). The Company's action aroused such widespread discontent among the seamers that a short spontaneous strike occured (*ibid.*).

In the six ensuing conferences held between February 28 and April 11, 1946, the parties discussed a draft agreement presented by the Company and revised proposals submitted by the Union. The Company's proposal reflected no changes in its earlier position with respect to the major issues in dispute (R. 39–42; 86–89). In addition, the Company's draft contained a clause, entitling the Company, in the event of violation of the Union's no-strike pledge, to cancel the contract, discharge the striking employees, and to reimburse itself for "loss of profits" out of monies to be deposited in escrow by the Union (R. 40; 128, 129). The Union strenuously objected to the proposals, particularly the indemnity provision, declaring that they had never "seen" or "heard" anything like it "in any of the bargaining we have ever done" (R. 40–41; 86, 96).

In order to facilitate agreement, the Union made a number of concessions. The Union re-

duced its wage and holiday demands and accepted the Company's vacation and insurance plans (R. 39, 41, 42; 86–87, 88, 97, 113). As to union security, the Union submitted a series of modified proposals, ranging from a maintenance of membership and check-off clause to several lesser proposals, including maintenance of membership with a 15-day escape clause, an irrevocable check-off for the life of the agreement, and Union preference in hiring and layoff (R. 43; 87, 89, 105). The Company rejected each proposal, and steadfastly insisted upon an open shop (R. 43; 87, 88). Agreement was reached only as to such minor issues as the use of bulletin boards by the Union and the procedure and compensation for the time spent by employees in grievance and negotiating conferences (R. 86–88, 94).

In the conferences that took place between May 9 and July 11, 1946, the Union made additional concessions. It offered to accept the Company's optional arbitration provision in return for some form of union security; scaled down its wage demand from 30 percent to 7½ percent; and offered to agree to a clause permitting the Company "to have the Agreement specifically enforced to prevent the violation thereof by injunction or other proper decree" of the local county court (R. 43, 44; 90, 97–98, 123). The Company rejected each of these offers (*ibid.*). Again agreement was reached on only relatively minor matters, such

as reporting pay and compensation for cleaning and oiling machines (R. 44; 105).

On July 25, in the midst of the negotiations, the Company, without prior consultation with the Union, announced a wage increase for the employees in line with a general area increase (R. 3–4, 45–46; 119, 111–112). The wage increase, of which the Union was notified two days in advance (the two days being Saturday and Sunday), was made effective as of July 29; it was precisely the same which the Union had demanded, and the Company had rejected, in the earlier conferences (R. 3, 45–46; 90, 98, 111–112). In putting the wage increase into effect, the Company restored its previous rates and practices for the seamers, again without consulting the Union (R. 4; 114–115).

On August 13, the Company offered another draft agreement to the Union (R. 47; 90). In addition to reaffirming the Company's rejection of any form of union security, binding arbitration and other Union demands, the draft contained, in Article IX, new and even more stringent provisions with respect to union liability (R. 4, 47–50; 90–91, 134–135). Thus, while the Company formerly confined its demands to a provision requiring the Union, in the event of breach of its no-strike pledge, to indemnify it for actual "loss of profits" out of an escrow deposit or a posted bond (R. 4, 40; 128, 129, 107), the

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new proposals prescribed an automatic "minimum penalty of $500.00 cash per day per plant" for the same violation, irrespective of the amount of the Company's actual losses. While the monetary penalties in its first proposal were directed only against the Union, Article IX specified additional fines against individual striking employees at the rate of "$3.00 a day for every day's absence from work" and penalized the strikers with loss of seniority. Furthermore, Article IX incorporated entirely new sections which, if violated by the Union, by its members, or even by non-members, automatically subjected the Union to penalties (R. 59–60). For instance, violation of the section binding "the Union and the employees" (Union members and non-members alike) not to engage, "either directly or indirectly" in Union activities on company time authorized the Company to discharge the individual violators or to make a "penalty assessment against the Union's funds" of from $10 to $50 for each violation (R. 48–49, 59; 134). Failure to abide by other new sections, including those requiring an international officer and the local president of the Union to repudiate unauthorized strikes, pledging the Union "for itself and the employees of the Company" to maintain "efficient production without interruption," and to prevent "strikes, work stoppages, spontaneous vacations and slowing down of work or agitation to do the same," and regulating the internal procedure of

the Union for calling strikes not banned by the contract, automatically put into operation the $500 per day penalty (R. 56–60; 134–135).

The Union, though incensed by the drastic new proposals,[3] and by the Company's unilateral action as to wages, continued to negotiate (R. 50; 91). On August 23, the Union requested the Company to sign an agreement embodying at least all the matters which had been agreed to by the parties in the previous negotiations (R. 51; 91). The draft agreement was almost entirely in the language of the Company and included all the concessions previously made by the Union in regard to such matters as vacations, insurance and holidays, and, in addition, a new concession accepting the Company's position with respect to optional arbitration of grievances (R. 51–52; 91, 92). The Company, however, refused to sign the agreement on the ground that it was incomplete, and that all proposals up to that time had been made "tentatively," subject to the negotiation of a complete contract (R. 52; 92).

At the next conference, held on August 27, the Union offered to accede to the Company's position on all matters except Article IX (R. 53; 98–99, 115). The Company rejected the Union's

[3] One of the Union's representatives testified, "instead of * * * improving [through bargaining] the no-strike-picket and lock-out clause, which was a bone of contention throughout most of the negotiations," the Company proposed a "worse" provision, "something that we had never seen" in any agreement (R. 91).

offer, insisting that it would not sign any contract which did not include Article IX, *in toto*, and provide expressly for an open shop (R. 4, 52; 92). It adhered to that position even when the Union offered to accept some parts of Article IX (R. 53; 99, 102, 115).

At the last conference held on November 4, the Union reiterated its willingness to accept the Company's open shop, seniority, and wage proposals and, in addition, about half of the provisions of Article IX, including provisions embodying the Company's rule against Union activities, and repudiating strikes in violation of the contract, entitling the Company to discharge employees participating in unauthorized strikes or work stoppages, requiring the service of a 10-day notice upon the Company prior to commencement of authorized strikes, and binding the Union "for itself and the employees" to maintain efficient production at the plant and to prevent "interference by the employees with the operation of the Company" (R. 53–54; 92–94, 102). The Union pointed out that it could not, however, accept the penalty assessment and liquidated damage clauses because they "would leave us wide open to bleed our funds under any circumstances that sometimes we wouldn't be responsible for," and because "we couldn't have any proper control or responsibility without a good Union security provision" (R. 54; 103, 105). The Company nevertheless insisted upon Article IX in

its entirety (R. 54; 112–113, 114). In a letter to the Union dated November 8, the Company reaffirmed its position, stating that the letter "constitutes the final answer of the company with respect to the provisions of Article IX" (R. 4–5, 55; 124).

Upon the basis of the foregoing facts and the entire record, the Board found (R. 3–5) that the entire course of the Company's conduct during the prolonged negotiations with the Union evidenced "a lack of good faith and a determination not to conclude an agreement with the Union" (R. 3–5).[4] The Board said (R. 5):

> The [Company], it is true, went through many of the motions of collective bargaining. It met on numerous occasions with the Union, conferred at length regarding contract proposals, made concessions on minor issues, and discussed and adjusted several grievances. These surface indicia of bargaining, however, were nullified by the [Company's] manifest determination to deprive the Union of any voice in determining such major issues as wage rates and working conditions. Such conduct on the part of the [Company] demonstrates that its participation in discussions with the Union was not intended to lead to the consummation of an agreement with the Union, but merely to preserve the appear-

[4] The Board also concluded (R. 5) that the Company's unilateral grant of the July 1946 wage increase, *per se* constituted a violation of Section 8 (5) of the Act.

> ance of bargaining. The [Company's] lack of a sincere purpose to reach an agreement is confirmed by its introduction of new and stringent demands after 7 months of negotiations. Accordingly, we find that the [Company] has, during the entire period since the Union's certification in January 1946, failed and refused to bargain in good faith with the Union as the exclusive representative of its employees, within the meaning of section 8 (5) and (1) of the Act.

The Board entered an order, in the usual form, requiring the Company to cease and desist from the unfair labor practice found; upon request, to bargain collectively with the Union; and to post appropriate notices (R. 5–6).

On March 29, 1949, six weeks after issuance of the Board's order, the Company filed with the Board a "Motion to Reopen Record and Modify Order," alleging that a majority of the employees no longer desired to be represented by the Union, and that enforcement of the order would therefore be inappropriate (R. 67–69). In support of the loss of majority contention, the Company asserted that it had been notified on March 24, 1949, that more than 80 percent of the employees had signed a petition requesting the Regional Director of the Board to decertify the Union as bargaining representative (R. 70–71). By order issued April 11, 1949, the Board denied the motion on the ground that "the facts which

the [Company] wishes to prove in the reopened proceeding would not constitute grounds for modifying the Board's order" (R. 72).

On November 16, 1949, the Board filed a petition for enforcement of its order in the court below (R. 168–172). On March 6, 1950, the court, Judge Soper dissenting, entered its opinion (R. 173–182) and decree (R. 183) enforcing the Board's order in full. The court held that the Company's "unilateral action, its insistence upon the harsh provisions of Article IX, its refusal to enter into an agreement with respect to matters no longer at issue, and the long and fruitless negotiations viewed in the light of the Union's many concessions, justify the conclusion that the [Company] acted in bad faith" (R. 180). The court pointed out (R. 179) that "The uncompromising attitude of [the Company] towards Article IX provides the final insight into [the Company's] lack of good faith in its negotiations with the Union. Instead of compromising on the indemnity provisions, [the Company] made them increasingly severe. Throughout the negotiations it is apparent that [the Company] lacked a sincere purpose to reach an agreement". The court further held (R. 180–181) that "the loss of Union majority subsequent to the issuance of the Board's Order, under the factual situation here involved, did not affect the validity of the Order."

ARGUMENT

1. The Company's contention (Pet. 10–12) that the Board may not consider proposals advanced and positions taken by the employer during negotiations, rests upon the fallacious assumption that the duty to bargain collectively is satisfied where the employer merely goes through the motions of negotiating, and does not require that the employer engage in collective bargaining in good faith. It is universally reconized, however, that under the National Labor Relations Act, as under the Railway Labor Act, the employer is required to bargain collectively in good faith, *i. e.*, "with a sincere purpose to reach agreement" (R. 179). *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 548, 550 (collective bargaining requires a "reasonable effort to compose differences"); *National Labor Relations Board* v. *Crompton-Highland Mills*, 337 U. S. 217, 225; *National Licorice Company* v. *National Labor Relations Board*, 309 U. S. 350, 358; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 525; *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874, 885, 886, (C. A. 1); *National Labor Relations Board* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 37 (C. A. 3); *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. 2d 632, 637 (C. A. 4); *Globe Cotton Mills* v. *National Labor Relations Board*, 103 F. 2d 91, 94 (C. A. 5); *National Labor Relations Board* v. *Swift & Co.*,

127 F. 2d 30, 31–32 (C. A. 6); *Singer Mfg. Co.* v. *National Labor Relations Board*, 119 F. 2d 131, 134 (C. A. 7), certiorari denied, 313 U. S. 595; *Wilson & Co.* v. *National Labor Relations Board*, 115 F. 2d 759, 763–764 (C. A. 8); *National Labor Relations Board* v. *Montgomery Ward & Co.*, 133 F. 2d 676, 686 (C. A. 9). The obligation to bargain collectively in "good faith" is specifically incorporated in the Act, as amended. Section 8 (d).

Determination whether the employer has satisfied the statutory obligation to bargain collectively in good faith requires examination of the background of negotiations, as well as the employer's attitudes and proposals, as every court which has considered the matter has held.[5] In *National Labor Relations Board* v. *Corsicana Cotton Mills*, 179 F. 2d 234 (C. A. 5), which the Company claims (Pet. 16–17), is "probably in conflict" with the decision below in this respect, the court determined the question of the employer's good faith upon examination of the entire record of negotiations, including the positions taken and proposals advanced by the em-

[5] See cases cited, *supra*, pp. 14–15, particularly, *National Labor Relations Board* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, where the court stated (at p. 37): "The fair dealing which the service of good faith calls for must be exhibited by the parties in their approach and attitude to the negotiations as well as in their specific treatment of the particular subjects or items for negotiation."

ployer. See the earlier opinions of the court in that case, 178 F. 2d, at pp. 346–347, 348–349.[6]

The evidence set forth in the Statement, *supra*, pp. 2–12, amply shows, as the Board and the court below found, that "Throughout the negotiations * * * [the Company] lacked a sincere purpose to reach agreement".[7] The Company's contention that by resting this finding in part, upon its insistence upon unreasonable indemnity provisions as a condition of agreement, the Board and the court below have, in effect, required the Company to "make concessions" and agree to terms which the Board would regard as "reasonable" (Pet. pp. 8–9, 10–11, 17–18) is entirely without merit. As the court below stated (R. 179): "The courts, under the Act, will never compel an employer to accept a particular contract. But when there is substantial evidence

[6] *National Labor Relations Board* v. *P. Lorillard Co.*, 117 F. 2d 921 (C. A. 6), reversed on other grounds, 314 U. S. 512, is not inconsistent with the view set forth above, as the excerpt from the opinion quoted by petitioner (Pet. 17–18) shows. In any event, subsequent holdings of the Sixth Circuit are entirely in accord with the decision below. See, *National Labor Relations Board* v. *Swift & Co.*, 127 F. 2d 30, 32.

[7] The Company's claim (Pet. 22), that "the employer has merely asserted its right to negotiate over a union-responsibility clause and has approached the bargaining table with an open mind and not with a fixed determination to avoid agreement * * *" is refuted by the express contrary finding of the Board and the court below. A challenge to this finding would, even if made, present no question of general importance warranting review by this Court.

that the employer is unwilling to bargain in good faith, we will not withhold our mandate." No conflict of decisions is shown.

2. The Company's contention that the validity of the Board's order was affected by the Union's alleged loss of majority, which occurred subsequent to entry of the Board's order, and while the unfair labor practice remained unremedied, has been repeatedly rejected by this Court. *Franks Brothers Co.* v. *National Labor Relations Board,* 321 U. S. 702, 705; *Medo Photo Supply Corp.* v. *National Labor Relations Board,* 321 U. S. 678, 687; *National Labor Relations Board* v. *Bradford Dyeing Association,* 310 U. S. 318, 340; *National Labor Relations Board* v. *P. Lorillard Company,* 314 U. S. 512; *National Labor Relations Board* v. *Mexia Textile Mills,* No. 434, this Term, decided May 15, 1950. In the *Medo* case, the Court held that an employer "cannot, as justification for its refusal to bargain with the union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of a majority. It cannot thus, by its own action, disestablish the union as the bargaining representative of the employees, previously designated as such of their own free will." In the *Franks* case, 321 U. S. 702, 705–706, the Court held that "a bargaining relationship once rightfully established must be permitted to exist

and function for a reasonable period in which it can be given a fair chance to succeed * * *. After such a reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships." But to "authorize the employer to assert diminution in membership in the certified union in an enforcement proceeding subverts the statutory mandate to leave these matters to the Board in separate proceedings under § 9 (c)." *National Labor Relations Board* v. *Mexia Textile Mills, supra,* slip opinion, p. 5.

Contrary to the Company's contention (Pet. pp. 9, 12–14, 18), Section 9 (c) (1) (A) (ii) of the Act, as amended, which permits employees to file with the Board petitions for decertification, does not affect the rule as to loss of majority enunciated in the *Medo* and *Franks* cases. That section, as the legislative history referred to by the Company itself makes clear (Pet. Br., pp. 25–26), was adopted to meet the situation which existed under the Wagner Act whereby employees, dissatisfied with their current representative, could secure an election only by authorizing another union to represent them. But the Board is no more required to entertain a petition filed under Section 9 (c) (1) (A) (ii) at a time when, because of unremedied unfair labor practices, a fair election cannot be held, than it is required to entertain a petition by the

employees under Section 9 (c) (1) (A) (i), or by the employer under Section 9 (c) (1) (B).* To hold to the contrary would permit the employer "to profit from a stubborn refusal to abide by the law." *Franks Bros.* case, *supra,* 321 U. S. 702, 705. See also *National Labor Relations Board* v. *Mexia Textile Mills, supra,* decided under the new Act.

National Labor Relations Board v. *Andrew Jergens Co.,* 175 F. 2d 130, 135 (C. A. 9), certiorari denied, 338 U. S. 827, and *National Labor Relations Board* v. *Arnolt Motor Co.,* 173 F. 2d 597, 599 (C. A. 7), which the Company claims (Pet. 18), are "probably" in conflict with the decision below, do not pass upon this question. In both cases the Board's order was enforced despite claims that the union had lost its majority. The holding of the only other Court of Appeals which has considered the precise question here presented under the amended Act is in accord with the judgment below. In *National Labor Relations Board* v. *Consolidated Machine Tool Corp.,* 167 F. 2d 470 (C. A. 2),

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* Compare the statement in the Report of the Senate Committee to accompany S. 1126, S. Rep. No. 105, 80th Cong., 1st Sess., p. 25, that "Neither of these amendments [Sections 9 (c) (1) (A) (ii) and 9 (c) (1) (B)] affects the present Board's rules of decisions with respect to dismissal of petitions by reason of an inadequate showing of representation or the existence of an outstanding collective agreement as a bar to an election. In other words, the Board could still dismiss an employee or employer petition if a valid contract were still in effect."

after the Board's bargaining order had been enforced by the Court of Appeals, the employees filed with the Board's Regional Director a petition for decertification pursuant to Section 9 (c) (1) (A) (ii). The Regional Director dismissed the petition on the ground that the employer had not complied with the Board's order, and the Board sustained his action. Thereafter, the employer filed in the Court of Appeals a motion to modify the order, asserting that the Board had acted improperly in dismissing the petition. The court held: "so far as the Board refuses to act upon the petition until the employer has complied with our order, it is for the Board to decide whether noncompliance is a reason for refusing to consider the employees' petition" (167 F. 2d, at p. 470). There are no contrary decisions.[9]

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[9] This case does not present the question reserved by this Court in *National Labor Relations Board* v. *Pool Mfg. Co.*, No. 435, this Term, decided May 15, 1950, slip. op. p. 5, "whether a Court of Appeals may under Section 10 (e) refer a matter back to the Board for appropriate action on a showing by the employer that subsequent to the Board's order, but before the petition for enforcement several years later, a rival union has filed before the Board a petition for recognition, not yet acted upon, which claims that the bargaining representative no longer has a majority of the employees." The question, viewed in the light of the issues framed in the *Pool* case, appears to assume that in the interim between issuance of the Board's order and the filing of the rival union petition, the employer complied with the order and bargained collectively with the Union for a reasonable period of time. The question further assumes that the Board has not

CONCLUSION

The decision below is clearly correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

ROBERT N. DENHAM,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

MOZART G. RATNER,
Acting Assistant General Counsel,

SAMUEL M. SINGER,
Attorney,
National Labor Relations Board.

JUNE 1950.

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acted upon the petition. In the instant case, the Company does not even claim that it bargained collectively with the Union as the order requires. Moreover, the Board passed upon and rejected the Company's motion to modify the order (R. 72). The decertification petition was dismissed by the Regional Director on March 29, 1949, and this action was affirmed by the Board on May 16, 1949, Case No. 34–RD–16.

APPENDIX

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

2. The relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*) are as follows:

* * * * *

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively

through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

"SEC. 8 (a). It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *.

REPRESENTATIVES AND ELECTIONS

* * * * *

"SEC. 9. * * *

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) asserts that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"(3) No election shall be directed in any bargaining unit or any subdivision within which, in

the preceding twelve-month period, a valid election shall have been held.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. * * *

* * * * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), * * *, within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circum-

stances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 60

TOWER HOSIERY MILLS, INC.
PETITIONER,

VS.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

REPLY BRIEF

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Brief of the National Labor Relations Board in Opposition fails to answer the Petitioner's contention that the Board's Order was affected by the Union's loss of majority, established by a decertification petition signed by more than 80% of the employees 3¼ years subsequent to the Board's certification. The Brief in Opposition does not take issue with any statement in the petition. Nevertheless, the Board ignores the clear mandate of Congress as expressed in the amended Act and apparently endeavors to create the impression that the facts and circumstances here presented are similar to, and therefore controlled by, the decisions of this Court decided prior to the amendment of the Act.

Thus, on page 17 of the Brief in Opposition the Board

states that the Company's contention that the Board Order should not be enforced because of the new and changed situations that have developed since the last election in December, 1945, "has been repeatedly rejected by this Court" and cites several cases. Each of the cases cited has been discussed in the Petitioner's supporting Brief, pages 22-25, and present an entirely different situation than prevails in this case. The Board relies particularly upon the decisions of this Court in the *Medo* and *Franks* cases. But both of these cases specifically directed the prodecure to be followed by employees when they desired to change the bargaining relationship previously established. This direction is clearly pointed out by the Court as will be seen by reference to the quotations found on pages 15 and 16 of the Petition. The employees in the instant case having followed this direction of the Court, and having claimed the rights vouchsafed them by the Act, should not be denied same simply because of an administrative attitude or decision on the part of the Board. It is imperative to remember that in all of the cases cited, the employer was the party who sought to disestablish the Union as the bargaining representative by a claim of majority loss; whereas, in the instant case it is the employees themselves who seek this right by means of a decertification petition. Subsequent to the docketing of the Petition in the instant case, this Court entered its decisions on 15 May 1950 in *N.L.R.B. v. Mexia Textile Mills, Inc.*, No. 434, and *N.L.R.B. v. Pool Mfg. Company, No.* 435. In the *Mexia* case, as in the *Medo* and *Franks* cases, the employer sought to disestablish the Union and to that end filed with the Court of Appeals a motion for the taking of additional evidence and alleged that after the Board Order and "after the record in the instant case was closed" it had come to the conclusion that the Union no longer represented a majority of employees in the bargaining unit. This Court reversed the Court of Appeals' grant of this request on the part of the employer, but clearly indicated that the decision

would have been different had the employees themselves sought to disestablish the bargaining relationship previously established:

> "The initiative in asserting that the bargaining representative no longer has a majority of employees is expressly withheld from the employer in § 9(c) of the Labor Management Relations Act of 1947. Under that section only 'an employee or group of employees or any individual or labor organization acting in their behalf' may 'assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) . . .' § 9 (c)(1)(A)(ii)."

Similarly, in the *Pool* case, where again the employer had sought to disestablish the Union by moving the Court of Appeals for leave to take additional evidence on the asserted ground that it doubted if the Union any longer retained the majority of the employees in the bargaining unit, the Court came to the same conclusion as in the *Mexia,* the *Medo* and the *Franks* cases and denied this request. This Court, however, expressly reserved decision on the precise question presented by the instant case, and said:

> "We need not now face the question whether a Court of Appeals may under § 10(e) refer a matter back to the Board for appropriate action on a showing by the employer that subsequent to the Board's order, but before the petition for enforcement several years later, a rival union has filed before the Board a petition for recognition, not yet acted upon, which claims that the bargaining representative no longer has a majority of the employees."

Of course, the same question is reserved and the same reasoning applies equally to an instance like the present where

the employees seek to decertify the Union under Section 9(c)(1)(A)(ii) of the Act as where they seek to change the bargaining representative to another and rival union under Section 9(c)(1)(A)(i). The Board recognizes on page 19 of its Brief in Opposition that the same principles govern in each case. The Board argues in footnote 9, page 20 of its Brief in Opposition, that the instant case does not present the question reserved by this Court in the *Pool* case but concedes that its position depends upon the validity of two assumptions. Neither of the assumptions is justified. The opinion of this Court in the *Pool* case does not contain any language that warrants or sustains the first assumption, but on the contrary clearly refutes such an assumption. The second assumption is not justified because the Board in the instant case has acted upon the petition only in the limited sense that it denied same, not upon a consideration of its merits, but by the application of a decisional formula in contravention of the Act. The Board dismissed the employees' decertification solely "on the ground that the *Employer* in the instant case has not complied with the Board's Decision and Order in Case No. 5-C-1847" (See Appendix to this Reply Brief, pp. 9 and 10 for Regional Director's and Board's dismissal of decertification petition in Case No. 34-RD-16).

The Brief in Opposition states on pages 18-19, "But the Board is no more required to entertain a petition filed under Section 9(c)(1)(A)(ii) at a time when, because of unremedied unfair labor practices, a fair election cannot be held, than it is required to entertain a petition by the employees under Section 9(c)(1)(A)(i), or by the employer under Section 9(c)(1)(B)". In view of the unequivocal language of Section 9(c)(1)(A)(ii) as amply corroborated by the legislative history of this section set forth on pages 25-28 of the supporting brief to the Petition, it is submitted that this position of the Board represents another instance of an attempted "administrative amendment of the

Statute" which was so recently condemned in the case of *Colgate-Palmolive-Peet Company v. N. L. R. B.*, 338 U. S. 355, (1949):

> "Nevertheless, with full realization that there was a limitation by the proviso of Section 8(3) upon the freedom of Section 7, Congress inserted the proviso of Section 8(3). It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the Act . . . To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress."

While the "administrative amendment" undertaken by the Board is as evident in the one case as in the other, still it is more insidious and destructive in the instant case than in the Colgate case because here the employees have no remedy for the correction of this denial of their statutory rights—they must rely on an employer who is under charge of violating the Act to claim their rights for them. Congress never intended such a paradox. The dogmatic refusal of the Board to effectuate the statutory mandate set forth in Section 9(c)(1)(A)(ii) means that a majority of the employees can never change their bargaining representative in any instance where "there are unremedied unfair labor practices". A minority union could thus thwart the employees' will by filing unwarranted charges against the employer and delaying an election while these charges are being investigated and litigated before the Board. But the Act is not so worded as to deny specific rights to a group of employees, simply because of the asserted wrongdoing of their employer. "The Board has not been commissioned to

effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." *Southern Steamship Co. v. N. L. R. B.*, 316 U. S. 31, 47. The Board's position in the instant case is untenable because it erroneously assumes that only the union and the employer are concerned; it ignores the fact that "there is a third and, as usual, forgotten interest here —those employees who did not want to be represented by the union" — dissenting opinion Mr. Justice *Jackson in N. L. R. B. v. The Tower Company*, 329 U. S. 324.

On page 19 of its Brief in Opposition the Board sets forth under footnote number 8 a statement from the report of the Senate Committee to accompany S. 1126. We do not disagree with this statement at all but, on the contrary, contend that it supports the position taken in the Petition. Concededly, Section 9(c)(1)(A)(ii) does not affect "the Board's rules of decisions with respect to dismissal of petitions by reason of an inadequate showing of representation or the existence of an outstanding collectively agreement as a bar to an election." In the instant case the Board does not contend that the decertification petition of the employees fails to show adequate representation or that there was an outstanding collectively agreement in existence. A showing of representation of more than 80% of the employees in the appropriate unit is certainly adequate; there has never been a collective agreement between the Company and the Union. Attention is directed to the fact that this footnote is cited as sustaining the Board's position that it is not even "required to *entertain* a petition filed under Section 9(c)(1)(A)(ii) at a time" when unfair labor practices are unremedied. In the instant case,

the dismissal by the Board of the decertification petition and the denial of the Petitioner's motion do not purport to be for any reason other than adherence to an administrative determination.

On page 19 of its Brief in Opposition, the Board states that the cases cited in the Petition, to-wit, *N. L. R. B. v. Andrew Jergens Company*, 9 Cir., 175 F. 2d 130, and *N. L. R. B. v. Arnolt Motor Company*, 7 Cir., 173 F. 2d 597, "which the Company claims are 'probably' in conflict with the decision below, do not pass upon this question." What the Petition did state was that the decision below "probably conflicts with the statements in the decisions" referred to. In the *Andrew Jergens* case the Court ruled that the Board's Order must be enforced where there was no petition by the employees to change the bargaining agent. However, the Court expressly noted that in arriving at this conclusion it did not consider, according to the direction and teaching of this Court in the *Franks* case, that there was involved "any injustice to the employees who wish a different arrangement" because they might petition for a change in the bargaining relationship:

> "To this we might add that § 9(c) of the Labor Management Relations Act of 1947 expressly extends the right to question a particular union's certification to '* * * an employee or group of employees or any individual or labor organization acting in their behalf * * *' "

In the *Arnolt Motor Company* case, the order was enforced because the assertion of a loss of majority status was raised by the employer and not by the employees. However, the Court likewise pointed out that the *Franks* case was authority for the position that after a reasonable period the Board might take steps to recognize changed situations, and said:

> "In concluding, we note that the Act, as amended, 29 U.S.C.A. § 159(c)(1)(A)(ii), now provides that if the employees desire that the labor organization which previously had been certified be decertified, or if they desire to substitute another representative, they may petition the Board to that effect, and the Board shall investigate the matter and hold a hearing and an election."

Quite obviously, there is a conflict in decisions because the Board in the instant case refuses to follow the aforesaid statements of the Seventh and Ninth Circuits to the effect that after the employees petition the Board to decertify a union "the Board *shall* investigate the matter and hold a hearing and an election" even though there are in existence unremedied labor practices on the part of the employer.

CONCLUSION

The Brief in Opposition fails to answer the Petition insofar as it deals with the rights of employees to have their decertification petition investigated and an election conducted to determine their choice of bargaining representative. The Brief in Opposition cannot obscure the presence in this case of novel and important questions which are vital to the effective administration of the Labor Management Relations Act, 1947, and the efficient operation of modern business conducted along democratic lines. For the reasons stated in the Petition, Supporting Brief and this Reply, the application for a writ of certiorari should be granted.

Respectfully submitted,

L. P. McLENDON,
Greensboro, North Carolina
THORNTON H. BROOKS,
Greensboro, North Carolina
THOMAS D. COOPER,
Burlington, North Carolina

APPENDIX

NATIONAL LABOR RELATIONS BOARD
WASHINGTON 25, D. C.

May 16, 1949

Messrs. Lacy R. Ray & Louie P. Weathers
c/o R. D. Douglas, Jr., Esquire
Box 406
Greensboro, North Carolina

Re: Tower Hosiery Mills
Case No. 34-RD-16

Gentlemen:

The Board has considered your request for review of the Regional Director's refusal to issue Notice of Hearing in the above matter and has sustained the decision of the Regional Director on the ground that the Employer in the instant case has not complied with the Board's Decision and Order in Case No. 5-C-1847 in which the Board ordered the Employer to bargain collectively with the American Federation of Hosiery Workers Union.

Very truly yours,
Frank M. Kleiler,
Executive Secretary

cc: John A. Penello, Reg. Dir., Reg. 5
Tower Hosiery Mills
Burlington, North Carolina

American Federation of Hosiery Workers
821-A Jefferson Standard Building
Greensboro, North Carolina

R. D. Douglas, Jr., Esquire
Douglas & Douglas
Box 406
Greensboro, North Carolina

NATIONAL LABOR RELATIONS BOARD

37 Commerce Street

Baltimore 2, Maryland

March 29, 1949

Messrs. Lacy R. Ray & Louie P. Weathers,
c/o R. D. Douglas, Jr., Esquire,
Box 406
Greensboro, North Carolina

Re: Tower Hosiery Mills
Case No. 34-RD-16

Gentlemen:

The above-captioned case, petitioning for investigation and decertification under Section 9(c) of the National Labor Relations Act, has been carefully investigated and considered.

In accordance with the principles announced in prior Board decisions, which appear to me to be controlling on the facts of the instant case as established by our preliminary investigation, it does not appear that further proceedings seem warranted in view of an outstanding Board Order in Case No. 5-C-1847 which has not been complied with requiring the Company to bargain collectively with the American Federation of Hosiery Workers. I am, therefore, dismissing the petition in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing a request for such review with the National Labor Relations Board, Washington 25, D. C., and a copy with me. This request must contain a complete statement setting forth the facts and reasons upon which it is based. The

request should be filed within ten (10) days from the date of receipt of this letter, except that the Board may, upon good cause shown, grant special permission for a longer period within which to file.

Very truly yours,

John A. Penello
Regional Director

Registered Mail
Return Receipt Requested
Cc:

National Labor Relations Board
Washington 25, D. C.

Tower Hosiery Mills
Burlington, North Carolina

American Federation of Hosiery Workers
821-A Jefferson Standard Building
Greensboro, North Carolina

R. D. Douglas, Jr., Esquire
Douglas & Douglas
Box 406
Greensboro, North Carolina